FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 13 [illegible]
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. [redacted]

CONTINENTAL CASUALTY COMPANY and
MARIE M. SHORT

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR APPELLANTS ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS J. CLARY,
JOSEPH V. McENERY,
714 Penfield Bldg.,
Philadelphia, Pa.,
Attorneys for Appellants.

MARTIN & LYLE, 302 Penfield Bldg., Phila., Pa. (1865, Keystone, Filbert 1865)

INDEX.

	Page
Statement of Case	1
Argument	3

TABLE OF CASES CITED.

Bronson vs. Schulten, 104 U. S. 410	4
34 Corpus Juris, 267	4
United States vs. Barger, 20 Federal 500	7
United States vs. Feely, et al., Federal Cases No. 15,082 (25 Fed. Cases 1055)	4
United States vs. Kelleher, 57 Fed. 2nd, 684	10
United States vs. Libichian, 113 Fed. 2nd, 368	7
United States vs. Rosenfeld, 109 Fed. 2nd, 908	8

STATUTES CITED.

Section 1020 U. S. Revised Statutes (18 U. S. C. A. Sec. 601)	3

Supreme Court of the United States

October Term, 1940. No. 868.

CONTINENTAL CASUALTY COMPANY and
MARIE M. SHORT

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR APPELLANTS ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT OF CASE.

This case comes before the Supreme Court of the United States upon a certificate to the said Court from the United States Circuit Court of Appeals for the Third Circuit, certifying certain questions of law concerning which it desires instruction. The pertinent facts involved being set forth in the certificate, it suffices to say that the matter originally came before the Circuit Court of Appeals from a Decision of the United States District Court for the District of New Jersey, dismissing a petition and supplemental petition filed in that Court praying for the remission of an order of forfeiture of a bail bond.

One Herbert R. Short had been convicted upon an indictment charging him with conspiracy in connection

with the operation of a still and the unlawful manufacture of liquor. He was released upon the entry of his recognizance in the sum of $10,000., conditioned upon his appearance for sentence on July 19, 1940, at Camden, New Jersey. He did not appear on that date and his bond was ordered forfeited. He was subsequently apprehended and on September 12, 1940, was sentenced to a term of imprisonment of three years, which he is at present serving. The Continental Casualty Company was the surety on the bond; Mrs. Marie M. Short, the wife of the defendant, executed a judgment note and a contract making herself liable in turn to the surety, as counter-surety in case of default.

They filed their petitions with the United States District Court, after the apprehension and sentencing of the defendant, praying for the remission of the order of forfeiture. The matter was argued before the trial judge, the Honorable Herbert F. Goodrich, specially presiding, who in an opinion, filed October 5, 1940, dismissed the petitions. An appeal to the Circuit Court of Appeals for the Third Circuit was filed and the matter heard, which Court in turn certified the case to the Supreme Court of the United States in accordance with the provisions of Section 238 of the Judicial Code.

ARGUMENT.

I. The petitioners, the appellants in the Court below, propose in this Brief of argument to answer the several questions certified to the Supreme Court, and state their reasons, supported by legal authority, for their answers. The learned hearing Judge dismissed the petitions for remission of the forfeiture because he believed that he was controlled by Section 1020 of the Revised Statutes, and that the petitioners had not successfully met the conditions imposed by the Statute.

Section 1020 of the Revised Statutes, (U. S. C. A. 18, Sec. 601) reads as follows:

> "When any recognizance in a criminal cause, taken for or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its decretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

It was admitted by stipulation of counsel that the default of the defendant, namely, his non-appearance for trial, was without excuse and wilful on his part; the petitioners contend that the Act of Congress does not apply to a petition to remit a forfeiture which is filed during the same term of Court within which the order of forfeiture was entered, and that the District Court had the legal right to remit the forfeiture.

Questions 1, 3 and 4, as certified by the Circuit Court, relate to the question of the effect of Section 1020 upon the power of the District Court to remit an order of forfeiture of a criminal recognizance after default, and these three questions, for the purpose of convenience, will be discussed together, rather than separately. The second question as certified relates to the interpretation of the wording of the Statute and will be discussed separately.

The appellants submit that during term time, the District Court has the power to remit its orders of forfeiture, and that it enjoys that jurisdiction as part of the common law power inherent in the court, apart from any Statute. In support of that proposition, it is submitted that the existence of such power was well recognized at common law. In 34 Corpus Juris 267, the Rule is stated as follows:

. . ."A court has full control over its orders or judgments during the term at which they are made, and may, upon sufficient cause shown, in the exercise of its sound discretion, amend, correct, revise, supplement, open or vacate such judgments. This was the rule at common law, and it prevails in almost all jurisdictions."

In BRONSON vs. SCHULTEN, 104 U. S. 410, it was decided that that power was vested in the District Courts of the United States, for at page 415, the Court says:

. . . "It is a general rule of the law that all judgments, decrees, or other orders of the courts, however conclusive in their character are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court."

Prior to the enactment of the Statute, which, by the way, was first enacted in February, 1839, (5 Statutes 321) Section 1020 being a re-enactment of the earlier Statute, it was decided that the District Court had the power to remit an order of forfeiture. In UNITED STATES vs. FEELY et al., Fed. Cases No. 15,082, (25 Fed. Cases 1055), it was decided that the United States Court in which a criminal recognizance was entered had the power to remit a forfeiture after default. In that case the Supreme Court stayed proceedings to sue out a bond and remitted a forfeiture after default. Chief Justice Marshall, in the opinion of the Court, said:

. . . "This then is an express decision that the Court in which the recognizance is filed, may if, upon the circumstances of the case, they see fit, after default has been made, and the recognizance is forfeited, refuse to permit it to be estreated, in order to be put in suit."

The question then properly arises, just what was the purpose of the Act of Congress, if the Court already had the power which the Act conferred? Obviously, if the District Court was possessed of the power to modify its orders, statutory authority to do so was unnecessary, and by the same token, having the unlimited power, controlled solely by the exercise of sound discretion, over the changing of its orders during term time, Section 1020 of the Revised Statutes, if applied during term time, limits that plenary power. The answer to the question, as we see it, is that the Act of Congress was intended to apply after term time, and was intended to confer additional jurisdiction, not to restrict a jurisdiction previously enjoyed. At common law, the power of a court to set aside its orders after the term of court when they were entered had passed was a very limited one. In 34 Corpus Juris 210, the rule is stated as follows:

> "At common law, and in the 'absence of statute' changing the rule, jurisdiction over the cause ceases with the expiration of the term at which final judgment was rendered, and thereafter the court has no power to correct or amend the judgment and a fortiori the court has no power after expiration of the term to open or vacate the judgment, except in either case pursuant to proceedings begun within the proper time and continued to the subsequent term; in such cases the proceedings remain in fieri, and the court may open, amend or vacate the judgment at the subsequent term. The only remedy after the term for irregular and erroneous judgments, as distinguished from void judgments is usually by new trial, review, writ of error, or appeal, as either may be appropriate and allowable by law, or by some other mode specially provided by statute."

In BRONSON vs. SCHULTEN, already cited, the Court says:

> "But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceedings by a writ of error or appeal as may be allowed in a court which, by law, can review the decision."

Without statutory authority the Appellants submit that the District Court would be without legal authority to remit an order of forfeiture after term time, no matter how much merit there might be in the case, nor how harsh the enforcement of the letter of the bond would be. We can imagine a case in which a defendant might fail to appear as conditioned in his bond and have valid reasons for not appearing; notwithstanding, his bond is forfeited and the bail is ordered sued out. The term of court expires in a few days and the defendant appears at the commencement of the next term and explains his non-appearance in a satisfactory manner. The court is then petitioned to remit the forfeiture and is powerless to act because, the term of court having expired, the court is without the authority and must turn a deaf ear to the prayer of the petition. To remedy that situation and permit courts to act with discretion in order to protect bondsmen from the harshness involved in the strict enforcement of their bonds, the Congress in 1839 enacted a remedial statute, subsequently re-enacted in Section 1020 of the Revised Statutes.

We submit that sound logic compels the conclusion that the Statute was only intended to take effect after term time. The opposite conclusion presents us with an anomalous situation. During the term in which the order was rendered the Statute would be a limitation of the Court's power: after term time it confers additional power, and consequently the one and the same Statute

would be both an extension of and a limitation on the power of the Court. To us that is a contradiction which we feel was not intended by the Congress.

In the recent case of UNITED STATES vs. LIBICHIAN, 113 Fed. 2nd. 368, it was decided that Section 1020 applied to remission of an order of forfeiture after passage of the term of court in which it was entered. The following is the quotation from the syllabus in this case:

> "The general rule that court is without jurisdiction to set aside final judgment entered at previous term is inapplicable in proceeding for annulment of judgment on and remission of penalty of recognizance bond under statute authorizing federal court to remit penalty of forfeited recognizance 'whenever it appears to the court' that there has been no willful default, that trial can be had, and that public justice does not require enforcement of penalty. 18 U. S. C. A., Sec. 601."

In UNITED STATES vs. BARGER, 20 Federal 500, this proposition came before the District Court, before the late Judge Acheson. In that case a defendant entered his recognizance to appear to await sentence. He failed to appear and his bail was ordered forfeited. He later appeared, and was sentenced and a Petition to remit the forfeiture was filed. The Court granted the prayer of the Petition, saying, page 501:

> "During the term when it is rendered or entered of record a judgment or an order, however conclusive in its character, is under the control of the Court pronouncing it, and may then be set aside, vacated, or modified. Bronson vs. Schulten, 104 U. S. 420.
>
> Upon this principle I think the Court has the power to take off the forfeiture of the recognizance in this case, although it may not be strictly within the letter of Section 1020 of the Revised Statutes."

The learned Judge, in the opinion of the court below, refers to the above case but refused to follow it on the authority of the case of the UNITED STATES vs. ROSENFELD, 109 Fed. 2nd 908 (1940), where the opposite conclusion was reached. In the Rosenfeld case, the court stated the proposition as follows, page 909:

> . . . "It is urged that the court retained full and complete jurisdiction during the term to modify or set aside 'an interlocutory judgment'; that there was no final judgment of forfeiture. Apparently, it is appellees' position that there is no final judgment of forfeiture until a money judgment has been entered against the sureties."

The court, in its opinion, decided that the statute was controlling even during term time on the theory that the judgment of forfeiture was a final judgment and that the court did not have authority to set it aside apart from statute. We again quote from the opinion, page 910:

> . . . "The court having entered a judgment of forfeiture and this being a final judgment, in so far that it was an adjudication of default for breach of conditions of the recognizance, it follows that we must look to the statute for the court's power of remission."

The Appellants submit that the decision of the Rosenfeld case is based upon faulty logic, the court assuming that the District Court has no control of final judgments during term time. Such reasoning is directly contrary to the statement of the law already cited in Bronson vs. Schulten, where it was decided that during term time the court pronouncing a judgment had control over it, however conclusive its character. The reasoning in the Rosenfeld case seems to be based on the proposition that the power of the court during term time to modify or vacate its judgments and decrees is confined to interlocutory decrees or judgments and not final ones.

In the instant case, the defendant was apprehended largely through the efforts of the sureties, within six weeks of the time of his flight and he was sentenced in less than two months from the time originally appointed. It seems to us extremely harsh to compel these sureties to pay the sum of $10,000. under the circumstances of this case, through saying that the District Court is without jurisdiction because of an Act of Congress. We think the better view is that the Act of Congress was intended to take effect after the expiration of the term in which the bond was forfeited and that the statute was a remedial one and meant to permit courts to grant a relief, which they previously had not the power to grant.

In the Rosenfeld case (cited supra) the Court arrived at its conclusion on the theory that immediately upon the default of the principal, the sureties became absolute debtors to the Government and that the authority of the Courts to disturb this debt was not unlimited but was controlled by the Act of Congress. It is true that when the condition of the bond is breached the promise of the surety becomes fixed and the obligee of the bond is entitled to collect the penal sum. However, in bail bonds it is necessary for the Court to formally order the bond forfeited before the obligee can proceed against the sureties. Consequently, if the Trial Judge, in this case, had not entered the order of forfeiture, upon the subsequent apprehension of the defendant, he could very well have refused to enter an order of forfeiture and the Government would have had no claims against the sureties, notwithstanding the breach of the condition of the bond. That being so, we fail to see any distinction between that situation and the power of the Court to vacate or remit an order of forfeiture during the term time.

In concluding this part of the Argument, the Appellants submit that the District Court has the authority to remit the forfeiture of a bail bond and that its power to do so, during the term of the court in which the forfeiture

was entered, is one of the common law powers of the court and not derived from statuate; that after term time, the authority to remit a forfeiture is controlled by Section 1020 of the Revised Statutes and further that Section 1020 of the Revised Statutes has no application during term time. That being so, the District Court, in this case, had the authority to consider the petitions for remission upon their merits.

II. The second question certified by the Circuit Court relates to the meaning of the word "party" as used in Section 1020 of the Revised Statutes, whether it relates solely to the principal in the bond or defendant or whether it includes party petitioning for relief, namely the surety.

We submit that if the word "party" as used in Section 1020 of the Revised Statutes does not mean the principal on the bond or defendant but means the party petitioning for relief of the forfeiture, the Appellants have met the conditions imposed by the Act of Congress.

The decisions in the various judicial circuits throughout the United States on the construction of Section 1020 of the Revised Statutes are varied and contradictory. In UNITED STATES vs. KELLEHER, 57 Fed. 2nd, 684, Judge Hand in the opinion of the Circuit Court discusses at great length the construction of the Act, particularly with reference to the meaning of the words "willful default of the party". He concludes that in order to give full effect to the Statutes that the word "party" should not mean the defendant alone but should be extended to mean the party petitioning for relief, namely the surety, and if it appears that the surety was in no way responsible for the non-appearance of the principal that there would be no willful default of the party within the meaning of the Statutes and that the relief should be granted. However, the learned Judge further states that the decisions in other Circuits of the United States appear to have been to the contrary and it has been decided in

othe. Circuits that "willful default of the party" means the defendant alone and not the surety and that he would not rule the contrary, notwithstanding that he felt that the other position was the sounder one.

It has been held time and time again that the purpose of bail is not to enrich the Treasury but to really give reasonable insurance that the defendant will appear for trial. In UNITED STATES vs. FEELY ET AL. (cited supra) the court said:

> "The object of a recognizance is not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty."

It is true that there is considerable diversity of opinion as to the meaning of the word "party". It seems to us that the purpose of the Statute being remedial that the widest extent should be given to it in order to fully accomplish its purpose. In every bail bond the surety obliges himself to produce the defendant for trial. If the condition of the bond is broken the prosecuting authorities look to the surety for the payment of the amount of the bond. They would never look to the principal for payment, except possibly in cases where cash bail has been deposited by the principal. Consequently, the Statute must have contemplated that in nearly every case of a forfeiture that the party seeking relief from the order would be the surety in the bond.

It further seems to us to make little difference whether the principal fled to avoid prosecution or whether he had some valid reason for his non-appearance, in the event that he is later apprehended and tried. It does seem to us to make some difference if the surety has in any way contributed to the disappearance of the principal or has assisted him in his flight. Bearing this in mind, it

would seem to us that a more sensible interpretation of the Statute would be to apply the meaning of the word "party" to the party petitioning and not the principal on the bond.

It is conceded that, in this case, the non-appearance of the defendant was willful and that the condition of the bond was broken. However, it further appears that the sureties, both the Company and individual, exercised all their energies to apprehend the defendant and that it was largely through the efforts of Marie M. Short that the defendant was taken into custody and brought before the court for sentence. It seems to us to work a manifest hardship on her if the court says that because the disappearance of her husband was willful that she, who is innocent, must be punished and in this case punished severely.

We, therefore, submit that the word "party" in the Statute should mean the party petitioning, namely the surety, and if it does not appear he contributed to the breach of the conditions of the bond that the forfeiture should be remitted, providing the other requirements of the Statutes are met.

Respectfully submitted,

THOMAS J. CLARY,
JOSEPH V. MCENERY,
Attorneys for Appellants.